

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1196

To be argued by
JOHN HOLLAND FOOTZ

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

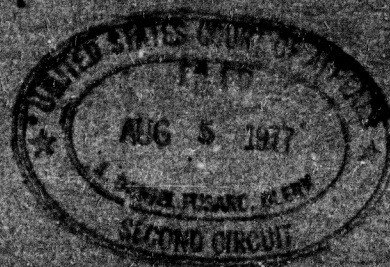
UNITED STATES OF AMERICA,
Appellee

v.

CHARLES RUSSO,
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES



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ON APPEAL FROM THE UNITED STATES
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BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the trial court was correct in instructing the jury that it could consider the revenue of appellant's gambling business in determining whether he committed the conspiracy charged.
2. Whether the evidence was sufficient to support the conviction.

STATUTES INVOLVED

Section 225, New York State Penal Law, provides in pertinent part:

§225.00 Gambling offenses; definitions of terms
The following definitions are applicable to this article:

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2. "Gambling." A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

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4. "Advance gambling activity." A person "advances gambling activity" when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

5. "Profit from gambling activity." A person "profits from gambling activity" when, other than as a player, he accepts or receives money or other property pursuant to an agreement

or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

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§225.05 Promoting gambling in the second degree

A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.

Promoting gambling in the second degree is a class A misdemeanor.

18 U.S.C. 1955 provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section --

(1) "illegal gambling business" means a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

18 U.S.C. 371 provided in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

STATEMENT

Appellant, Salvatore (Sam) Gingello, Salvatore (Red) Russotti and Paul Comfort were indicted in the United States District Court for the Western District of New York in two counts, charging them with operating an unlawful gambling enterprise and conspiracy to commit that offense, in violation of 18 U.S.C. 1955 and 371.^{1/} Following a jury trial from which Comfort's case was severed,^{2/} Gingello and Russotti were acquitted on both counts; appellant was acquitted of the substantive offense and convicted of the conspiracy. He was sentenced to 18 months' imprisonment.

In sum, the evidence showed that appellant, in concert with several others, planned and managed a dice game in Rochester, New York, which operated from late January 1973, to mid-April of the same year, with an interruption in March when the game was moved to a different location. The principal witnesses at trial were Joseph Zito, a long-time acquaintance of appellant (G. App. 37) and an informant for

1/ Named as unindicted co-conspirators were Sol Sharfstein, Joseph Zito, and Joseph Salerno.

2/ Comfort has not yet been tried.

the government,^{3/} and undercover Agent Paul Brana of the Federal Bureau of Investigation, who Zito introduced to appellant as a financial backer for the game.

1. The Government's Evidence.

In the latter part of January 1973, Zito joined appellant and Paul Comfort in the operation of a dice game on Jay Street in Rochester, New York (G. App. 38-39).^{4/} Appellant and Comfort had recently gone bankrupt running a similar game there; Zito invested \$3000 to renew the game, and Comfort and appellant each invested an additional \$1500 (G. App. 39).^{5/}

The game was to run six nights a week, every night except Saturday (G. App. 39-40),^{6/} and began in the last week of January 1973 (G. App. 75). Several people were employed in the operation: appellant and Comfort alternated as dealers, paying off the bets when they were won or lost (G. App. 41). One Walt was the "stick man," raking in the

^{3/} Zito had been convicted in federal court of extortion, and agreed to cooperate in this case in an effort to obtain favorable treatment from the authorities.

^{4/} Zito testified that the Jay Street location had been the site of a gambling operation for two or three years prior to his investment in Russo's game (G. App. 93).

^{5/} The three men ultimately invested \$7000 in the game, before going bankrupt in March 1973 (G. App. 49).

^{6/} All of the testimony concerning the operation of the game while at the Jay Street location was provided by Joseph Zito.

dice after a customer had thrown them. Joe Comfort, Paul's father, made coffee and sandwiches and cleared the premises. Joe Salerno also worked as a "stick man," and performed other chores, as did Frank Ferrara. Zito was the "box man," handling the flow of cash to the dealer and maintaining the bankroll (G. App. 42). Zito testified that it was the practice for the staff to work 30 minutes on and 30 minutes off, and to rotate positions (G. App. 63).

In addition to paying his employees, appellant paid Sam Gingello for permission to operate the game (G. App. 6, 76-78). According to Zito, Gingello was the boss of gambling in Rochester (G. App. 76), and periodically during the operation of the Game, Gingello came to the Jay Street location where appellant paid him \$100 per night for every night the game ran (G. App. 46). Appellant also told Zito that they needed to pay off the police as well, and Zito saw Rochester police officers on the Jay Street premises six or eight times. (G. App. 48). On these occasions, the officers would alert appellant and the others that other police were coming, in order to give them time to clear the tables. Appellant or Comfort would then meet with the "cooperating" officers in a nearby office (G. App. 46-48).

The game ran at Jay Street until early March 1973, when appellant Zito and Comfort again ran out of money (G. App. 49-50) and began to look for another source of funds with which to continue operating. By this time, Zito had informed the FBI of the game's financial difficulties, and on March 27 or 28, 1973, he was introduced to Agent Brana, who discussed with him a ruse whereby Brana could become involved in the operation (G. App. 50-51). Brana, they agreed, would be introduced to appellant as Paul Becera, a friend of Zito's from New York City, a "mob guy" with money to enter the Rochester game, which Brana would offer to finance (G. App. 4-5, 51).

On March 31, 1973, as a result of these plans, Brana and Zito met with appellant in Caledonia, New York, to discuss the operation of the game (G. App. 3-4, 51). Zito told appellant that Brana was interested in becoming a financial backer (G. App. 5, 52). Appellant said that he had both a location for the game and the necessary workers, whom he identified as his partner "Pauly", himself, Zito, and an unnamed stick man (G. App. 5). He asked Brana if he could provide \$5000, and said that expenses for the workers and rent would be \$275 a night (G. App. 5, 52). Appellant also said that in order to operate they had to pay "the Good Guys", or "the Arm", \$100 a night or \$600 a week, since the game

was to continue to run every night except Saturday. Without the payment, he said, "we just didn't run a crap game in Rochester." (G. App. 6). In return for his \$5000, Brana was to receive 70% of the profits (G. App. 6).

On 12, 1973, appellant and Zito met at the Rochester Airport to await Brana's arrival. Appellant told Zito that since they had last talked, the Jay Street location had become unavailable, but that they were to get a new location on Webster Street in Rochester, which had previously been used for a bookmaking operation (G. App. 55, 79). When Brana arrived, appellant repeated that the Jay Street location was lost because it had been made into a union hall, but that a location on Webster Street would be available in about a week (G. App. 6, 8, 55, 79). Appellant also said that Sam Gingello had decided to invest \$5000 in the game, and that as a result, Brana would only receive 50% of the profits (G. App. 7, 80-81).^{7/} Since the Webster Street location was smaller than the one on Jay Street, however, and in order to help get the game started, the cost for the "franchise" was to be reduced from \$600 to \$200 a week (G. App. 8, 80).

^{7/} It had also been decided that Red Russotti would participate in the game in order to get it off the ground (G. App. 80).

On April 8, 1973, appellant met Zito and Brana in a bowling alley near the Webster Street location and told them that the game would begin the following night with the workers he had previously named (G. App. 56). Appellant then showed Brana the arrangement of the facilities at Webster Street. During this meeting, he told Brana that it would not be necessary to make payments to the police yet, since the officers who were then being paid were located on the other side of Rochester and did not patrol the Webster Street area. Appellant said that he would know in a few days if local police needed to be contacted, and that the owner of the bowling alley where they had met (a friend of appellant's) knew the local day captain. If there were any problems, the owner could make arrangements (G. App. 56-57).^{8/} He also said that Gingello had not yet produced his \$5000 investment (G. App. 12).

The game was renewed the next night, April 9, 1973. Brana and Zito arrived at Webster Street and gave appellant the bankroll money. The workers present were as appellant had said: Joe Salerno, Frank Ferrara, Joe Comfort, Paul Comfort,

^{8/} In fact, Russo spoke to the owner that same evening, April 8, and then told Brana that he had made arrangements to meet with the day captain (G. App. 12).

and Sol Sharfstein.^{9/} As before, appellant and Zito also worked (G. App. 15-16, 59-61). During the evening, a total of approximately \$35,000 was wagered (G. App. 17, 64, 86), yielding gross profits of \$600 or \$700 (G. App. 65-66).^{10/} Later that evening, after the game, Russo told Brana that Gingello had decided for a time to forego collection of any fee for permission to operate the game, in order to let it get "off the ground" (G. App. 18, 80, 83).

The Webster Street game ran for the second time the next night, April 10, 1973, using the same workers as the night before (G. App. 22-23). On this occasion, appellant told Brana that he ran the night crap game in Rochester (after 7 p.m.); that his brother ran the day crap game; and that no other family was permitted to do so (G. App. 20). Appellant also

^{9/} All the men who worked but one were the same people who had worked at the Jay Street game, and the one extra, Sol Sharfstein, was hired because of his usefulness in the new location: Sharfstein had previously bankrolled games in the area and was expected to attract wealthy Jewish customers (G. App. 16, 59). Russo said at this meeting that Paul Comfort would work as dealer, Russo and Sharfstein would be box men, Frank Ferrara would be the doorman (lookout) (G. App. 24), and Joe Salerno would be "ladder man" (charged with sitting on a ladder above the table and monitoring the course of play.) (G. App. 16, 23). The game itself was to be a "modified Las Vegas type game" in which all bets were placed against the house, rather than against individual players (G. App. 15, 65). Bettors laid wagers that the dice thrower would or would not make his points, and wins would be paid from the \$5000 Brana bankroll. (Id.)

^{10/} Brana testified that on any given roll, between \$300 and \$600 was wagered by the various players. Over the entire game, the \$35,000 estimate of total wagers was "conservative" (G. App. 17).

said that when he was not running a crap game, he ran a blackjack operation. (Id.). He again told Brana not to worry about the police, that he would put up the necessary bail money if anyone was arrested, and that he had the equipment to begin operating at a new location if the Webster Street game was raided (G. App. 21).

Gross wagers that night again exceeded \$35,000, with a gross profit of \$1900 (G. App. 25, 87).

The game ran a third night, April 11, 1973. Again the workers were the same as before, with the exception that Bill Barton had replaced Frank Ferrara as the door man (G. App. 27, 67, 70). Gross betting again exceeded \$35,000, with a gross profit of approximately \$1200 (G. App. 28).

On April 12, 1973, the fourth and last night of the Brana-financed segment, appellant and Brana arrived at the Webster Street location, where the game began with the same workers as the night before. At the end of the evening, gross wagers were approximately \$40,000; but this night the house lost money, and the original \$5000 bankroll was reduced to \$2550 (G. App. 34-35).

During the course of the game, Sam Gingello and Red Russotti arrived and went into an office area with appellant and Zito. Gingello and Russotti began yelling at Zito, asking

him what he was doing in the game (G. App. 72).^{11/} Russotti then slapped Zito several times and told him to take Brana and leave Rochester, threatening to kill him if he did not comply (G. App. 72-73).^{12/} Gingello and Russotti left shortly thereafter and the game resumed for the night. It did not resume the next night, however, and arrests were made within a few days.

2. The Court's Instructions Concerning the Conspiracy Count.

At the close of the government's case, appellant moved for a judgment of acquittal as to both the substantive and conspiracy counts on grounds that the government had failed to prove that the illegal gambling business had been in substantially continuous operation in excess of 30 days, and that the indictment did not charge that the business had had a gross revenue of \$2000 in any single day. Specifically defense counsel argued that acquittal was required because the evidence was insufficient to prove the former basis for federal jurisdiction, and the indictment failed to allege the latter (G. App. 96-102). The court denied the motions.

^{11/} Zito was equipped with a body transmitter, and a tape of the conversation in the office was introduced at trial.

^{12/} Gingello had previously expressed suspicion that Brana was working for forces seeking to take over the gambling business in Rochester. (G. App. 67, 88, 89).

At the close of the defense case, during argument on proposed instructions to the jury, the defendants renewed these assertions (G. App. 109-111, 114-115).^{13/} The court ruled that the defendants were correct as to the substantive charge of the indictment, and thereafter twice instructed the jurors that they could not consider proof of the \$2000 alternative in their deliberations on the substantive charge (App. C. 914, 940).

However, the court went on to rule that as to the conspiracy charge, the government had a "freer hand," (App. D. 719), since the precise contours of a criminal agreement are often difficult to determine (Id.). Therefore, the court instructed the jury that it could find appellant and the other defendants guilty of conspiracy if it found that each had conspired to run an illegal gambling business, "and that each of the other elements of the crime existed, namely that the plan involved five or more persons . . . that the dice game was to be in substantially continuous operation for over thirty days, or that the plan involved that the gross take was to be over \$2000 in any one day." (App. C. 940-941).

^{13/} Appellant does not appear to have joined in the motions for judgment of acquittal on these grounds, but rather to have contended only that the government had failed to prove a violation of state law (G. App. 105). He did join in a motion to dismiss the indictment (G. App. 109, 118-119).

After the court had thus instructed the jury, appellant joined the other defendants in renewing their objection to the instruction permitting consideration of the \$2000 alternative as to the conspiracy count (App. C 946, 950).

ARGUMENT

- I. THE TRIAL COURT PROPERLY ALLOWED THE JURY TO CONSIDER THE REVENUE OF THE APPELLANT'S GAME IN DETERMINING WHETHER HE COMMITTED THE CONSPIRACY AS CHARGED.

INTRODUCTION

Appellant's principal contention here, as below, is that the court's instructions erroneously allowed the jury to consider evidence of the revenue of his gambling business, as well as its duration, in determining whether "jurisdictional elements" of the conspiracy had been proved. In particular, he argues that because the indictment did not specifically charge him with conspiring to conduct a gambling enterprise with gross revenues in excess of \$2000 per day, the jury should have been prohibited from considering such evidence; he also argues that operation of the business in excess of 30 days, while adequately charged, was not supported by the proof. He concludes that the jury's verdict was based on conduct either not charged or not proved, and that this "ambiguity" requires reversal.

Appellant's argument is without merit. The central issue before the jury was whether appellant's plan contemplated operation of a gambling business forbidden by New York state law. In deciding this question, the court properly allowed the jury to consider evidence of the business as it actually operated -- including inter alia both its duration and profitability -- whether or not these facts were described in the indictment, just as overt acts not alleged in an indictment can ordinarily be shown to prove a conspiracy of which they were a part. The indictment here did not have to charge additionally (and fairly read it did not charge) that appellant's plan would have come within the substantive statute in some particular way, either by the duration of the game or its revenue. Neither these nor any other potential results of a contemplated illegal venture need be alleged under a charge of conspiring to conduct it. This is so because the conspiracy statute punishes the criminal agreement rather than the crime itself, which (so long as one overt act is undertaken) may not even have begun. Rather, a conspiracy indictment is adequate if it states that the defendant contemplated a venture which, if carried out as agreed, would have violated a specified substantive statute. The conspiracy charge here, which did specify the substantive statute and tracked some of its language, adequately met this standard.

1. The conspiracy count of the indictment alleged that "between January 20, 1973 and April 20, 1973, in the Western District of New York," appellant and named others conspired to conduct "an illegal gambling business, involving a dice game which violated the provisions of Article 225 of the Penal Law of the State of New York," in violation of 18 U.S.C. 1955 and 371. The indictment described two overt acts committed in furtherance of the conspiracy, including an allegation that on April 9, 1973, appellant and Paul Comfort "supervised the operation of a dice game at 124 Webster Street, Rochester, New York." (App. B.)

In our view, the general language of the conspiracy charge fairly embraced evidence showing the game's operation, including its revenue, and therefore created sufficient leeway for the jury to consider that evidence in determining whether appellant's plan would have violated 18 U.S.C. 1955. See United States v. Gargulio, 554 F.2d 59, 63 (2nd Cir. 1977). The established rule is that an indictment suffices if it apprises the defendant of the charge he must be prepared to meet, protects him against being held twice in jeopardy for the same acts, and adequately describes the offense for which grand jury has found probable cause to believe he is guilty. Hamling v. United States, 418 U.S. 87, 117 (1974); Russell v. United States, 369 U.S. 761, 764-765 (1962); United States v. Trotta, 525 F.2d 1096, 1098 (2nd Cir. 1975) cert. denied, 425 U.S. 971; United States v. Salazar, 485 F.2d 1272, 1277 (2nd Cir. 1973), cert. denied, 405 U.S. 985.

Special considerations apply in the case of a conspiracy indictment, where the criminal agreement itself is the gist of the offense (Callanan v. United States, 364 U.S. 587, 593-594 (1961)). For that reason a conspiracy charge need not allege "with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy . . . or state such object with the detail which would be required in an indictment for committing the substantive offense." Wong Tai v. United States, 273 U.S. 77, 81 (1921) (citations omitted); see also United States v. Cohen, 518 F.2d 727, 733 (2nd Cir. 1975); United States v. Perez, 489 F.2d 51, 70 (5th Cir. 1973), cert. denied, 417 U.S. 945. Rather, it is adequate if the alleges "a common intent sufficient to identify the offense which the defendant conspired to commit." Wong Tai, supra. Thus, the courts have "sustain[ed conspiracy] indictments in which the elements of the object offense have been not merely imprecisely stated but completely omitted." United States v. Pheaster, 544 F.2d 353, 360 (9th Cir. 1976) cert. denied, No. 76-5296 (Feb. 22, 1977). The indictment here clearly exceeded this standard.

Appellant has cited no case, and we have found none, holding that in even a substantive indictment under 18 U.S.C. 1955, the government is required to allege one or the other of the "scope of operation" elements of subsection (b)(1)(iii) (operation in excess of 30 days or gross revenue of \$2000 in a

single day) in order to allow the jury to consider evidence probative of either. Indeed, we do not believe that a substantive indictment would be required to meet so stringent a standard, since (as appellant acknowledges (Br. 19)) an indictment is ordinarily sufficient if it identifies the approximate time and place of the offense and describes it in language that tracks the statute. United States v. Lam Lek Chong, 544 F.2d 58, (2nd Cir. 1976), quoting United States v. Salazar, 485 F.2d 1272 (2nd Cir. 1973), cert. denied, 405 U.S. 985; see also United States v. Bermudez, 526 F.2d 89 (2nd Cir. 1975) cert. denied, 425 U.S. 970; compare United States v. Trotta, supra.^{14/} If, in an unusual case, the defendant believes he must know in advance of trial which of the bases in subsection (b)(1)(iii) the government will rely on, he may file a timely request for a bill of particulars setting forth his claim. But however

^{14/} That one or the other of the two alternatives here in issue would not need to be pleaded even in a substantive indictment is supported by the proposition that neither is an "element" of the offense in the ordinary understanding of the term. The alternative methods of establishing federal jurisdiction provided by section 1955 (b)(1)(iii) are "unrelated to the criminal character of the conduct." United States v. Leon, 534 F.2d 667, 674 (6th Cir. 1975) (involving the "five persons" requirement of the statute). Rather, they are simply requirements for the invocation of federal jurisdiction. Ianelli v. United States, 420 U.S. 770, 790 (1975); see S. Rep. No. 91-617 p. 73 (1969). Accordingly, a defendant is liable for the federal violation even though he was not aware that his conduct could be prosecuted in federal court. United States v. Feola, 420 U.S. 671, 685-694 (1975). See also United States v. Freed, 401 U.S. 601 (1971) (an indictment need not allege that defendants knew that firearms in their possession were unregistered in order to support a conviction under 26 U.S.C. 5861(d).).

that may be, a charge of conspiracy to violate Section 1955 is not required to plead one or the other prong of subsection (b)(1)(iii) of the substantive statute,

because the purpose of the conspiracy may have been accomplished even though such activity fell short of completing a substantive offense.

United States v. Knox Coal Co., 347 F.2d 33, 38 (3rd Cir. 1965). Any other rule would amount to requiring exactly the "technical precision" disapproved in Wong Tai.

Again, a conspiracy indictment by definition alleges an agreement to commit a crime, not a completed offense. Once it charges that the agreement was undertaken to violate a specified substantive law -- as it did here -- it cannot be required in addition to speculate on whether one or another particular aspect of the scope of the agreement, if and when it became operational, would have come about. This is particularly true in a case of conspiracy to violate Section 1955, since each of the jurisdictional bases of subsection (b)(1)(iii) describes an operational detail of the game that could only be known after the substantive crime was complete and that does not define either the act or the intent necessary to commit the offense. Indeed, the formation of appellant's plan (and therefore of the conspiracy) would have been accomplished even if the game he contemplated.

had never even begun, much less continued for any specific^{15/} period of time or involved any particular amount of money. Since it is not the size of the gambling business but its intentional operation in violation of state law that is the "core of criminality" (United States v. Bernstein, 533 F.2d 775, 782 (2nd Cir. 1976) cert. denied, No. 75-1789 (Dec. 6, 1976)) defined by Section 1955 (see note 14, supra), an allegation of conspiracy to commit that offense, where the "core of criminality" is the antecedent unlawful agreement, should not be required to charge explicitly the jurisdictional element, much less to describe that element in terms more specific than would be required to charge the completed offense. See United States v. Bernstein, supra; cf. United States v. Bermudez, supra, 526 F.2d 89, 94.

In sum, the indictment here charged appellant with a conspiracy to violate Section 1955 in terms adequate to notify him of the charge he was required to meet, notwithstanding the

^{15/} A defendant need not contemplate an operation of any particular size to be convicted of the conspiracy charge before. So long as he knowingly agrees to an unlawful plan, and the plan as envisioned would result in a game of sufficient size to satisfy the jurisdictional requirements of Section 1955, the defendant is liable for conspiracy to violate that statute regardless of his knowledge vel non of those requirements. See United States v. Feola, 420 U.S. 671. The court's instructions here, which permitted a conspiracy conviction only if the jury found appellant planned "that the dice game was to be in substantially continuous operation for over thirty days, or that the plan involved that the gross take was to be over \$2000 in any one day" (App. C. 940-941) therefore were more favorable to appellant than required.

absence of specific pleading of the alternative bases for federal jurisdiction over the substantive offense. It follows that the trial court was correct in instructing the jury that it could consider evidence of the game's revenue, as well as other aspects of its operation, in deciding whether the game as planned would have violated the specific federal statute.

Finally, we note that appellant has failed to show how he was prejudiced by the asserted variance between the charge and the evidence relied upon to prove it, other than his general claim, discussed above, that the indictment failed to give him fair notice. In view of the fact that appellant never sought a bill of particulars, such a claim would ring hollow

16/ Appellant appears to contend (Br. 12) that the conspiracy count not only failed to state which of the jurisdictional alternatives the government would show, but that it "relie[d] exclusively on the 30 day alternative."

This claim, however, does not square with the general language in which the conspiracy count was cast. While it does allege that appellant conspired "between January 30, 1973 and April 20, 1973," this description simply states the dates during which the conspiracy existed; it does not charge those dates as a jurisdictional element of Section 1955 (b) (1) (iii), and indeed does not even refer to the length of the game but to the length of the conspiracy.

in any circumstances;^{17/} here the claim was not raised until the trial was near its end, despite ample earlier indications that the government would offer evidence of the game's revenue. Specifically, the only overt act in which appellant was named alleged his supervision of the dice game on April 9, 1973. From that, appellant was necessarily on notice that the government would introduce evidence concerning the operation of the game, including the amount wagered. Furthermore, the prosecutor's opening statement did not advert to the duration of the gambling business, but rather to its revenue alone (G. App. 1). And during the taking of evidence, appellant did not manifest concern over the proof of the financial success of the game: in his brief cross-examination of the government's witnesses, he chose only to seek to discredit Joseph Zito, or to develop a possible entrapment defense based on the use of FBI funds to finance the game. Indeed, appellant first raised this issue at the close of the government's case, and again shortly thereafter at the close of all the evidence, in his motions for judgment of acquittal and dismissal.

17/ Appellant contends that a bill of particulars was not necessary because he "could not possibly deem it necessary to ask . . . whether the government intended to rely on the \$2000 rule." (Br. 19). But even on the erroneous assumption underlying this attitude, i.e., that the conspiracy count can fairly be read to allege the 30 day alternative set forth in subsection (b)(1)(iii) of the substantive statute, (See note 16, *supra*), appellant does not explain his failure to raise the issue at the outset of trial, once the prosecutor explicitly discussed the \$2000 alternative. (G. App. 1).

In these circumstances, the indictment should be "liberally construed in favor of validity," United States v. Pheaster, supra, 544 F.2d 353, 361. The trial court was therefore correct in viewing the conspiracy charge as valid against appellant's claim that it did not adequately encompass the "\$2000 alternative," and its instructions to the jury based on that view were accordingly both fair and, as respects appellant's rights, correct. ^{18/}

II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.

Appellant's argument (Br. 14-17) that the evidence was insufficient to support the conviction is premised on his view that the jury should not have been allowed to consider the undisputed testimony that the gambling business had revenue in excess of \$2000 for the several days of its operation. That view is incorrect, and appellant's argument therefore unavailing. Since the evidence of revenue was properly considered by the jury, and since the sufficiency of that evidence to show a plan that violated Section 1955 is not disputed, appellant's entire sufficiency claim must fail. ^{19/}

^{18/} See note 15, supra.

^{19/} As noted below, the jury was clearly warranted in concluding that appellant's plan contemplated an operation sufficiently large to gross the revenues of actually received.

Nevertheless, we think it appropriate briefly to point out that, contrary to appellant's discussion, the evidence of other aspects of the game, including its actual duration, was also ample.

As we have noted, in order to prove the conspiracy with which appellant was charged, it was necessary only to prove that his original criminal agreement -- the gist of the offense charged -- contemplated a pattern of activity which would in due course encompass facts necessary to the establishment of jurisdiction under the substantive statute. In other words, the government did not have to show that the conspiracy actually was in substantially continuous operation for more than 30 days (or make \$2000 in any one day), but simply that the conspirators anticipated a business that would achieve such scope. United States v. Leon, supra, 534 F.2d 667, 674-675 (6th Cir. 1975); see also United States v. Feola, supra, 420 U.S. 671, 694 (1975). Taken as a whole, the evidence amply proved that appellant contemplated a business that would achieve at least that size.

The decision to bring Paul Brana into the operation of the game was not designed to construct a short-term operation to be directed by Brana, but rather to permit appellant, Zito, and Paul Comfort to continue the operation of appellant's self-professed (if not particularly successful) monopoly over

night crap games in Rochester (G. App. 20). Moreover, the arrangements made to pay off both Sam Gingello (the local "boss"), ^{20/} and the police ^{21/} hardly bespoke a small-time business.

In light of these facts, appellant's claim that the actual duration of the game was not shown to be 30 days is, even if correct, beside the point. In any event, it is incorrect. It starts by overlooking the testimony that the Jay Street location had in fact been in operation for more than 30 days (from late January to early March 1973) even before it temporarily ran out of money and was forced to move. If the jury believed that testimony (which, on appeal, must be

^{20/} The arrangements with Gingello were particularly illuminating. In order to operate a crap game in Rochester, according to appellant, it was necessary to pay Gingello \$100 a night for each night of operation. Appellant had paid that amount to Gingello for permission to operate at Jay Street (G. App. 45-46). When discussions with Brana were first held concerning the refinanced game, it was expressly stated that this same fee would be required. (G. App. 5-6). It was only later, and as a consequence of the move to Webster Street, that the fee was reduced to \$200 a week (G. App. 8). Still later, the fee was reduced to nothing, but only so that the game was able "to get off the ground" (G. App. 18). It was thus contemplated that once the game was indeed in successful operation, the payment of the \$100 fee would resume. Therefore, it is clear that the conspirators envisioned an ongoing game which would eventually be able to pay its way with the "Good Guys."

^{21/} Police protection had been provided at Jay Street, and was intended at Webster, facts highly indicative of a professional operation, not an evanescent one.

considered in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1949)) then appellant's argument that the resumption was in fact a second, different game rather than a "substantially continuous" renewal of the first was a question the jury never had to reach in order to find him guilty. The evidence that the Webster Street location was indeed a continuation of a single game, moreover, was convincing, as shown in our statement of facts, supra.^{22/}

But even if the Webster Street and Jay Street segments were not identical the evidence that each involved the same type of game, substantially the same personnel, and potentially required the same payments for permission to run the game and for police protection, necessarily gives tangible dimension

^{22/} Appellant contends that certain alterations in the work force between the two games constituted "notable differences" between them (App. Br. 16). None of the changes in personnel however, was a material alteration in the character of the operation. Comfort's transformation from investor to worker was understandable, since the very reason that the conspirators sought out Brana was that they had run out of money to invest in the game.

Appellant also notes that Sol Sharfstein had been added to the Webster Street game. However, Sharfstein was hired because he had previously bankrolled games in the area, and would be able to attract wealthy Jewish customers to the game. (G. App. 16, 58-59). The need to rebuild clientele is also readily understood. The Jay Street segment had been in operation for some time, apparently, even before Zito joined it (G. App. 93). A sudden move to a new and smaller location would necessarily entail disruption of the operation.

to what appellant expected of the "new" game at Webster; he anticipated that it would continue indefinitely.

The evidence taken as a whole was, therefore, little short of overwhelming.

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the Appellee's Brief and two (2) copies of its Appendix have been mailed to counsel for Appellant at the following address:

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